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Review of the inputs to the substantive preparatory process and the International Conference on Financing for Development

Technical notes

Note by the Secretary-General

Addendum

Technical note No. 2:* Existing proposals for international cooperation to combat corruption, including repatriation of illegally transferred funds to the countries of origin

I. Introduction

1. In its most recent reports, the United Nations Centre for International Crime Prevention has indicated that, in recent years, the international community has demonstrated an increased awareness of the problems associated with corruption and a determination to combat it. The academic and policy literature has been greatly enriched through studies, analysis and academic publications, which have reached and highlighted some common and basic conclusions. Corruption is seen to be multifaceted and to affect every society regardless of its level of development or the sophistication of its organization. While the underlying causes may range from the societal to the institutional, one conclusion shared by most is that corruption exacerbates other problems and derails development efforts, while it wreaks havoc on efforts to build, consolidate or further develop democratic institutions.

2. Recent developments in the political and economic spheres seem to have had two major consequences. Firstly, the phenomenon is no longer confined within national borders and, secondly, the levels of tolerance worldwide, of both the political leadership and the public at large, seem to be dropping

* The preparation of the present technical note was coordinated in the Financing for Development Coordinating secretariat. Staff from the following entities collaborated, in a personal capacity, in its preparation: the United Nations Centre for International Crime Prevention, the Department of Economic and Social Affairs of the United Nations Secretariat, the International Monetary Fund (IMF), the Organisation for Economic Cooperation and Development (OECD), the United Nations Development Programme (UNDP) and the United Nations Conference on Trade and Development (UNCTAD). Several sections contained in the most recent report of the Centre for International Crime Prevention are reproduced extensively in this note because of their relevance.

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rapidly. This has been coupled with consistent and strong calls for action against the phenomenon at all levels.

3. Analysis of the existing instruments, recommendations and other documents reflects several similarities in structure, themes and language. Those similarities may be an indication of the fact that in efforts against corruption common problems have been confronted and the negotiation process has produced comparable solutions, despite the different contexts in which the solutions have been considered.

4. Most of the intergovernmental organizations through which the existing international legal instruments have been developed are regional. Thus, the instruments have been developed by countries facing similar problems and sharing, at least to a certain degree, similar legal practices. The Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[1] with signatories from five continents notably has a wider geographical coverage. One global legal instrument with anti-corruption provisions in which developing countries from all regions presently participate fully is the United Nations Convention against Transnational Organized Crime.[2]

5. Proposals for global action on corruption have been developing quite rapidly, inter alia, since the inception of the financing for development process. Most recently and significantly, in August 2001, the United Nations Centre for International Crime Prevention hosted the Intergovernmental Open-ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption, which met to make recommendations on the scope and coverage of an international legal instrument against corruption (as requested by the General Assembly in its resolution 55/61) and to consider issues related to illegally transferred funds and the repatriation of such funds to their countries of origin (as requested by the Assembly in its resolution 55/188). The recommendation of the Expert Group that States Members of the United Nations forge a new, legally binding international convention against corruption by the end of 2003, as contained in the report of its meeting held in Vienna from 30 July to 3 August 2001 (A/AC.260/2), will be transmitted to the Assembly at its fifty-sixth session through the Commission on Crime Prevention and Criminal Justice at its reconvened tenth session.

6. In its draft resolution brought to the attention of the General Assembly for consideration and action (see A/AC.260/2, sect. II), the Expert Group also proposed that the Assembly voice concern about the seriousness of the problems posed by corruption "which may endanger the stability and security of societies, undermine the values of democracy and morality and jeopardize social, economic and political development" (first preambular para.). The Expert Group noted that, while a number of regional arrangements and non-binding international declarations were already in place, no comprehensive instrument with force of international law currently existed. The treaty, as envisaged, would address many aspects of the problem, including preventive measures, criminalization, sanctions and remedies. The Expert Group likewise recommended that the negotiators of the convention should also be asked to consider provisions on jurisdiction, seizures, protection of witnesses, liability of legal persons, transfer of illicitly obtained funds abroad, return of such funds and a range of international cooperation measures.

7. The present technical note refers first to the work of the United Nations regarding proposals relating to corruption, and illicit transfers of funds and the return of such funds to the countries of origin. Then, the corresponding proposals from other institutions and organizations are presented. The note quotes and draws extensively from the documentation prepared by secretariat of the Centre for International Crime Prevention for the expert group meeting, particularly the most recent comprehensive report on existing international legal instruments and recommendations addressing corruption.[3] The note does not address the range of technical assistance programmes offered by the United Nations system to aid Governments in combating corruption.[4]

II. Proposals

Within the United Nations

8. In the report of the Secretary-General to the Preparatory Committee for the International Conference on Financing for Development (A/AC.257/12) of 18 December 2000, the link between

respecting domestic laws and financial regulations and the mobilization of domestic resources was underscored. The report recommended that "member States should strengthen measures to fight corruption at the national and international levels, including through enhanced international cooperation. In this regard, they should call for expeditious completion of preparatory work for the elaboration of an international legal instrument against corruption under the aegis of the United Nations — independent of the United Nations Convention against Transnational Organized Crime — and for the convening of a conference for the negotiation of the corresponding legal instrument by the earliest possible date (box between paras. 26 and 27)".

9. For its part, the report of the High-level Panel on Financing for Development (see A/55/1000) issued on 26 June 2001 highlights, in its executive summary, the point that "every developing country needs to set its economic fundamentals in order. No country can expect to achieve equitable growth, or to meet the International Development Goals, unless it focuses on building effective domestic institutions and adopting sound policies including: governance that is based on participation and the rule of law, with a strong focus on combating corruption" (see principal recommendation 1). The same concern is also raised in the reports to the Preparatory Committee for the Conference of the regional consultative meetings on financing for development.

10. As indicated above, in its resolution 55/61 of 4 December 2000, the General Assembly recognized the desirability of an effective international legal instrument against corruption and requested the Secretary-General to convene an intergovernmental open-ended expert group to examine and prepare draft terms of reference for the negotiation of the future legal instrument against corruption. Subsequently, in its resolution 55/188 of 20 December 2000, entitled "Preventing and combating corrupt practices and illegal transfer of funds and repatriation of such funds to the countries of origin", the Assembly invited the intergovernmental open-ended expert group convened in accordance with Assembly resolution 55/61 to include an examination, on the same basis, of the question of illegally transferred funds and the repatriation of such funds to the countries of origin.

11. The report and recommendations of the Expert Group will be transmitted to the General Assembly at its fifty-sixth session through the Commission on Crime Prevention and Criminal Justice. As previously indicated, the main recommendation of the Expert Group is that Member States of the United Nations forge a new, legally binding international convention against corruption by the end of 2003.

12. At the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna from 10 to 17 April 2000, the issue of corruption was also addressed, both in the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century,[5] and in the workshop on combating corruption,[6] organized by the United Nations Interregional Crime and Justice Research Institute in cooperation with the International Scientific and Professional Advisory Council.

13. In adopting the Vienna Declaration, Member States committed themselves to taking enhanced international action against corruption and stressed the urgent need to develop an effective international legal instrument against corruption (para. 16). There was general agreement on the importance of transparency and the independence and integrity of investigative and subsequent criminal justice processes (para. 154). The discussion highlighted the need for justice to be applied to past activities, including financial recovery of the proceeds of corruption, proper investigation, prosecution and the application of effective criminal and/or non-criminal sanctions (para. 155). At the same time it was considered necessary to provide appropriate prevention measures for the future, including the strengthening of civil society (including the media and the private sector), decreasing opportunities for corruption of high- and low-level officials, improving their status and providing social rewards for those who were not corrupt in the performance of their duties (para. 156).

14. The Expert Group Meeting on Corruption and its Financial Channels, that met in Paris from 30 March to 1 April 1999 (as requested by the Economic and Social Council in its resolution 1998/16 of 28 July 1998) explored means of ensuring that recent multilateral initiatives against corruption were effective and that an appropriate international strategy against corruption, including the proceeds thereof, was formulated in consultation with other intergovernmental organizations active in the area. After identifying a set of measures to improve international cooperation in combating corruption and the detection of financial

flows related to corruption, the Expert Group made a series of recommendations to be taken both at the international and at the national level (see E/CN.15/1999/10, sects. B, D and E).

15. At the international level, the Expert Group, inter alia, stressed the need to explore ways and means of persuading all insufficiently regulated financial centres to adopt rules enabling them to trace and take action against the proceeds of corruption, to participate actively in international cooperation efforts against related financial crime and, if necessary, to consider the introduction of measures to protect the global financial system from centres that posed the most significant problems or that did not participate in international cooperation (para. 13 (d)).

16. At the national level, the Expert Group recommended that corruption in all its forms should be criminalized and that bribe-givers and the proceeds of corruption should be covered under anti-money-laundering laws (para. 14 (a)); steps should be taken to ensure that bank secrecy and tax provisions did not hamper international administrative and judicial cooperation in combating corruption as well as to ensure that the authorities possessed sufficient capacities to provide prompt judicial cooperation in cases involving corruption or the laundering of the proceeds of corruption (paras. 14 (f) and (g)); and the capacity of States to prevent their financial systems from being used by bribe-givers and bribe-takers to transfer or launder money related to corrupt deals should be strengthened through the establishment of systems for the appropriate regulation and supervision of financial activities, based on internationally accepted principles (para. 14 (h)).

17. In addition, the Expert Group proposed the use of comprehensive systems for the prevention of money-laundering and the detection of illicit financial flows in combating corruption, including, in particular, the requirement that financial institutions should identify their customers, exercise vigilance and report suspicious transactions to a competent authority responsible for their investigation (para. 14 (j)).

18. In December 1996, the General Assembly adopted two important instruments in the fight against corruption: the International Code of Conduct for Public Officials[7] (resolution 51/59, annex) and the United Nations Declaration against Corruption and Bribery in International Commercial Transactions[8] (resolution 51/191, annex). Although both instruments are non-binding, they are still politically relevant, as they represent a broad agreement in the international community on these matters.

19. Regarding illicit transfers, in its resolution 55/188 the General Assembly called for increased international cooperation with regard to devising ways and means of preventing and addressing illegal transfers, as well as repatriating illegally transferred funds to the countries of origin, and called upon all countries and entities concerned to cooperate in that regard. As already mentioned above, the Assembly also invited the intergovernmental open-ended expert group, which was to prepare draft terms of reference for the negotiation of a future legal instrument against corruption pursuant to Assembly resolution 55/61, to include examination of the question of illegally transferred funds and the repatriation of such funds to the countries of origin. The Expert Group has thus presented a proposal to address these matters in a comprehensive way, by including them in the new international convention whose negotiation is being recommended.

20. It is noted that policy proposals in this area have been affected by a number of vexing problems. According to the report of the Secretary-General (E/CN.15/2001/3) cited earlier, the question of illegally transferred funds resulting from corrupt practices commonly involve (a) immense amounts of wealth that represent a comparatively high proportion of the victimized country's resources; (b) the transfer of that wealth outside the country; (c) a high level of factual uncertainty regarding the countries and accounts holding the illicitly transferred wealth; (d) the correct identification of the legitimate beneficiary and titles for such assets; and (e) a complex of jurisdictional issues. Hence, the recommendation of the Intergovernmental Open-ended Expert Group that the newly proposed convention on corruption should also address, in a holistic approach, these issues.

21. The report of the Secretary-General also notes that policy recommendations relative to the repatriation of illegally exported funds by corrupt leaders need to address three broad categories: practical, political and legal difficulties. From the practical perspective, the Government seeking repatriation of funds does not always have the necessary financial resources to trace and recover them. In the global economy, funds are extremely mobile and can be hidden through secrecy and the use of multiple jurisdictions and tax havens.

When it comes to the sophisticated laundering and investment of wealth exported overseas, traditional investigative methods often prove ineffective. Sometimes, even promising "leads" are lacking. In some cases, when Governments cannot cover the legal expenses, they seek contingency fee arrangements with major law firms and, given the length and uncertainty involved in the repatriation process, these contingency fees have not yet provided a reliable modality.

22. When dealing with illegally transferred funds by public sector officials, the Government succeeding a corrupt leader often has to establish its legitimacy and obtain recognition by the international community, inter alia, by countries where the funds may have been deposited or invested. Moreover, in some cases, the victimized Government may not pursue the claims with the required vigour for fear of embarrassing members of the local political and economic elite whose role in reconstruction is considered vital. Therefore, given the socio-economic devastation such leaders often leave behind them, the new Government may be unable to comply with international "standards" in a prompt and timely manner.

Organisation for Economic Cooperation and Development

23. The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is a legally binding treaty that obliges signatory countries to establish the bribery of foreign public officials in international business transactions as a criminal offence under their national laws. It is open to adherence by both OECD and non-OECD member countries. It entered into force on 15 February 1999 and at present, 33 of the original 34 signatories have ratified the Convention.

24. It provides that bribery includes not only the payment but also the offer or promise of a bribe and sets out an autonomous definition of "foreign public official" which covers elected or appointed officials and officials exercising a public function such as the head of a public agency or company. Sanctions by signatory countries must be effective, proportionate and dissuasive and apply to both natural and legal persons. There are also some non-criminal provisions covering accounting requirements, external audit and company controls, and the tax non-deductibility of bribe payments. Countries are required to facilitate mutual legal assistance and to provide extradition.

25. All signatory countries are obliged to cooperate in a programme of systematic follow-up to monitor and promote the full implementation of the Convention. This monitoring programme is the responsibility of the Working Group on Bribery in International Business Transactions and includes regular reviews of countries' legislation to implement the Convention and their efforts to enforce the Convention in practice, the examination of specific issues that arise in the course of monitoring, and the regular provision of information to the OECD Council of Ministers and to the public at large through publication on the Internet of reports on individual country performance (see http://www.oecd.org/daf/nocorruption/instruments.htm)

26. The Anti-Corruption Network for Transition Economies assists Eastern European and successor countries of the former Soviet Union, through a policy dialogue over the Network's web site as well as annual meetings and specific seminars or workshops, in identifying appropriate political, institutional and economic reforms for combating corruption. The Stability Pact Anti-Corruption Initiative, co-chaired by OECD and the Council of Europe, calls for States in South-Eastern Europe to take measures to combat corruption by adapting laws and regulations in conformity with international instruments. The Asian Development Bank/OECD Anti-Corruption Initiative for Asia-Pacific calls for the development of a regional anti-corruption action plan aimed at strengthening national and regional efforts. The Anti-Corruption and Governance Initiative for Latin America, as a joint effort of the Organization of American States (OAS), the Inter-American Development Bank and OECD, aims at promoting stronger monitoring mechanisms in the implementation of international standards and provide a forum for regional policy dialogue.

27. OECD members had adopted a first Recommendation on Bribery in International Business Transactions in 1994. In 1997, the OECD Working Group on Bribery reviewed the 1994 Recommendation. The Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the OECD Council on 23 May 1997, is the result of analytic work on anti-corruption measures and commitments undertaken over the previous three years to combat bribery in international business transactions. The Revised Recommendation invites